

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

McKelvin Gilbert,	:	
	:	C.A. No. 05-12-0076AP
Defendant below/	:	
Appellant,	:	
	:	
v.	:	
	:	
Wendy Nicholson,	:	
	:	
Plaintiff below/	:	
Appellee.	:	

Submitted: April 19, 2006

Decided: April 19, 2006

Decision on appeal from the Justice of the Peace Court.

Appellant's appeal is dismissed and the Judgment of the Magistrate is affirmed.

McKelvin Gilbert, 53 Pardoners Tale Lane, Felton, Delaware 19943, Pro Se Appellant.

Wendy Nicholson, 104 Summoners Tale Lane, Felton, Delaware 19943, Pro Se Appellee.

Trader, J.

In this appeal from Justice of the Peace Court 16 from the magistrate's order denying an application to vacate a default judgment, I hold that the magistrate correctly exercised his discretion in denying that application. Accordingly, the appeal is dismissed.

The relevant facts are as follows: On July 29, 2005, the appellee, plaintiff-below, filed a civil action in Justice of the Peace Court 16 against the appellant, defendant-below. On October 24, 2005, the appellant failed to appear for trial at the scheduled time and judgment by default in the amount of \$15,000.00 was entered against him. The appellant filed a motion to vacate the default judgment, and on December 1, 2005, the Justice of the Peace Court denied appellant's motion to vacate the default judgment. At the time of the scheduled hearing, the appellant was in Canton, Ohio in connection with his employment, but he did not call the Court and request a continuance. A second motion to vacate the default judgment was denied by the magistrate on December 6, 2005. The appellant filed a praecipe and notice of appeal with this Court on December 13, 2005.

In the case before me, the appellant did not take an appeal from the default judgment, but instead moved to vacate the default judgment. The appellant is taking an appeal from the magistrate's denial of his motion to vacate a default judgment.

The denial of an application to vacate a default judgment is subject to appeal. *Ney v. Polite*, 399 A.2d 527, 529 (Del. 1979). The appeal permits only the review of the magistrate's order denying relief and not of the default judgment itself. *Id.* An appeal from the judgment of the Justice of the Peace Court entitles the appellant to a trial *de novo* of the matter which was decided by the Justice of the Peace. *Kenyon v. Setting*, 1992 WL 52200 at *1 (Del. Super. Feb. 20, 1992).

Applying the above principles, I held an evidentiary hearing on all factors pertinent to the appellant's motion in the court below. Under Justice of the Peace Court Civil Rule 60(b)(2), a Justice of the Peace Court may vacate a final judgment on the ground of excusable neglect. The appellant failed to appear at the scheduled time of the trial and he failed to appear at the hearing on the motion to vacate the default judgment. Although he was in Canton, Ohio at the time of the scheduled hearing to vacate the default judgment, he made no attempt to contact the Court and request a continuance of the hearing. The burden of proof to establish excusable neglect is upon the appellant, and he has failed to offer evidence that constitutes excusable neglect. I conclude that the appellant's conduct was mere negligence or carelessness and does not constitute the conduct of a reasonable person. *Cohen v. Brandywine Raceway, Ass'n.*, 238 A.2d 320, 325 (Del. Super. 1968). Since the appellant's conduct did not constitute excusable neglect, I hold that the magistrate correctly exercised his discretion in denying the application to vacate the default judgment. Additionally, the defaulting party does not have a meritorious defense to this civil action. At the evidentiary hearing, it was established that the appellant's two dogs were running loose and viciously attacked the appellee's dog causing fatal injuries.

Based on these findings of fact and conclusions of law, the appeal is dismissed and the judgment of the magistrate is affirmed.

IT IS SO ORDERED.

Merrill C. Trader
Judge